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ABSTRACT

Legal reasoning employs weak sense critical thinking (pointing out inadequacies in the reasoning of others) rather than strong sense critical thinking (applying the same skills to one's own argument as well). The adversary model does not encourage lawyers to examine critically either the client's or their own arguments. The lawyer's task is to argue a conclusion and persuade others to embrace it. Legal arguments reflect reliance on authority and precedent. An analysis of the canons of proof in Roe vs. Wade illustrates these modes of reasoning. (A page from the Supreme Court Reporter containing references to abortion and privacy issues is appended.) (SR)

# The Tension Between Critical Thinking and Legal Reasoning

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## The Tension Between Critical Thinking and Legal Reasoning

A superficial glance at legal reasoning convinces the observer that it represents just another disciplinary mode in which the skills of critical thinking are paramount. Logical, precise connections between facts and legal inferences are encouraged. The reasonableness of one's argument is a primary explicit criterion applied to legal briefs. Law students are taught to discover the analysis and reasoning in each case as a guide to understanding the eventual synthesis with diverse fact patterns. In addition, many legal scholars have eagerly jumped on the critical thinking bandwagon by alleging that they too are encouraging critical thinking in their classrooms.

Any harmony between critical thinking and legal reasoning cannot, however, withstand a comparison of praxis in the two domains. What even the best lawyers do represents a highly restricted form of critical thinking. Initially, this paper attempts to spell out the tension between critical thinking and legal reasoning.

The latter half illustrates this tension by analyzing the canons of "proof" in Roe v. Wade. If there is substantial harmony between critical thinking and legal reasoning, we should find in Roe v. Wade a mode of argument that conforms to the standards of critical thinking.

## I. Do Lawyers Use Critical Thinking?

To ascertain whether lawyers use critical thinking, it is especially helpful to recall Richard Paul's distinction between weak and strong sense critical thinking. The use of evaluation skills to point out inadequacies in the reasoning of others constitutes weak sense critical thinking; applying the same skills to one's own arguments as well denotes strong sense critical thinking.

Alternatively, one can envision weak sense critical thinking as defending one' vested interests using evaluation skills. Strong sense critical thinking, in contrast, has a different purpose. In an attempt to discover a more reasonable opinion or solution, a strong sense critical thinker attempts to resist normal loyalty to current positions. To accomplish this self-censorial task, strong sense critical thinkers consciously apply evaluative criteria to all arguments, including their own favorites.

Surely all of us who have had the unpleasant experience of believing we were encouraging strong sense critical thinking, only to find that our students envisioned the critical thinking process quite differently. Many of our students are delighted to learn weak sense critical thinking as a guide to more effective persuasion or manipulation. Indeed there are many skills taught under the rubric, "critical thinking," that are highly useful to prospective advertisers, politicians, or scholars with vested interests. Imagine, for instance, what the

artful advocate can do with the knowledge contained in Damer's Attacking Faulty Reasoning (1986).

Lawyers, like other professional advocates, recognize the efficacy of weak sense critical thinking. The Code of Professional Responsibility that guides lawyers in making ethical decisions implicitly sanctions weak sense critical thinking. Lawyers are required to "zealously represent" their clients. That representation does not include pointing out the erroneous nature of the client's arguments.

Lawyers are presented with a perspective and then are paid to represent it. Consequently, they are provided training in weak sense critical thinking as a device for ridiculing alternative perspectives. Clients are not paying for civic education, moral training, nor guidance toward truth; they seek victory! Good lawyers fulfill that objective.

Legal training, provides explicit coaching in reverse logic - conclusion first, then reasons - to enhance students' abilities to attack opponents' arguments. For instance, a recent text on legal tactics (Schlag and Skover, 1986) introduces its topic with the following implicit embrace of reverse logic or reason shopping:

> A legal argument can be seen as a series of "moves" designed to persuade the reader to accept a particular position. This book catalogues the "tactics" or "counter-moves" that are used routinely to attract legal arguments. ... It's up to you to persuade your audience.

That an opponent's arguments might be more reasonable than one's own is not the point. A good argument is one that sells in a particular context.

Donald McCloskey (1988) defends this legal criterion for judging the effectiveness of arguments as necessary "social reasoning." Analogy and reliance on precedent or authority are the common tools of legal reasoning (Levi, 1948) because they work so well. In his zeal to edulcorate legal reasoning, McCloskey defends ad hominem arguments, argumentum ad baculum, argumentum ad verecundiam, and argumentum ad populum. He terms criticism of such forms of rhetoric "logic-mongering." Only if "strong" argument is identical to "effective" argument, however, can we make much sense out of either McCloskey's analysis or the approach to critical thinking adopted by law schools.

Even legal scholars frequently embrace habits of mind that would earn a low grade in an undergraduate critical thinking course. Law review editors apparently regard the magnitude of footnotes as persuasive evidence of careful thought.(Barrett, 1988) In what must be some kind of record for arguments from authority, Dean Jesse Choper of the University of California Law School recently listed 1,611 footnotes for a single article. That footnote mania "works" in terms of garnering acceptances makes more sense when one realizes that, with rare exceptions, the referees are students who are understandably impressed by a cascade of arguments from authority.

Nothing in the previous paragraph is meant in any way to disparage the quality of the minds of those who write in law

reviews. In fact, even the briefest exposure to legal analysis suggests that legal scholars possess uncommon breadth and diligence. It would be most surprising, however, if those who encourage weak sense critical thinking in their classrooms could completely disassociate themselves from the same type of thinking when they attempt to build a publication record.

Strong sense critical thinking would obstruct most legal reasoning, particularly in situations where one is arguing on behalf of a client. Clients understandably want every possible "winning" argument to be made. They and their legal counsel are interested in identifying questionable contentions and assumptions in their own arguments only for purposes of preparing their rebuttals should opposing counsel be especially clever.

## II. Roe v. Wade: What Is Persuasive in A Legal Context?

Despite numerous attempts to modify its ruling that women in their first trimester have a limited right to choose an abortion, Roe v. Wade has stood for fifteen years as the legal rule governing this ongoing dispute. What constituted convincing support for both Justice Blackmun's majority opinion and Justice Rehnquist's dissent? Is that support similar to modes of proof acceptable in a critical thinking classroom?

Blackmun offers several reasons to defend his decision that states may regulate abortion procedures during the first trimester only in ways reasonably related to maternal health.

1. History demonstrates that ideas about abortion have regularly changed. An extensive history of attitudes toward abortion is provided, apparently to provide justification for the further evolution Blackmun's decision would represent. Somehow we are supposed to be convinced that because others have changed their minds about abortion, Roe v. Wade's particular reification of this historical tendency is apt.

   That history reveals multiple instances where communities changed their minds about abortion hardly justifies particular prospective changes.

2. Numerous arguments from authority are cited throughout the decision. The reasoning responsible for the arguments is apparently not nearly as important as the number and impressiveness of the authorities.

   For instance, we are told that Aristotle and Plato commended abortion. In addition, one-third of the States had recently modified their abortion rules in directions consistent with Blackmun's holding. The American Medical Association, American Public Health Association, and the American Bar Association were all cited as supporters of the holding.

In addition, as the appendix indicates, Blackmun provided dozens of legal citations that he claimed were consistent with his holding. Why he chose that group of citations, rather than numerous others that would push the reasoning in a different direction is not shared with us.

The privacy right on which the decision depends is said to have "roots" in the First, Fourth, Fifth, and Fourteenth Amendments. Such an argument from authority would convince only those already convinced because others see no such "roots."

Arguments from authority are often necessary. The speed with which a decision must be made or inaccessibility of the argument to the layperson might justify reliance on authorities. In the case of Roe v. Wade, however, neither of those rationales justifies the extent of the reliance on authorities as a substitute for thought.

3. Because the privacy right of the mother is "fundamental" and the state lacks a "compelling" interest during the first trimester, the holding is justified.

> From a rhetorical perspective, the use of "fundamental" and "compelling" are essential. Both are mandatory inclusions in the rationale for they constitute the persuasive vernacular of Constitutional Law in this domain.
>
> To the critical thinker such labels beg the question. The terms are conclusory - restatements of the conclusion, posing as reasons. Without clear standards concerning the denotation of such terms, they can be used willy nilly to justify one's conclusions.

Judge Rehnquist responds by using the same mode of discourse. Unlike the majority, he claims the decision to abort is not private. He reaches this judgment by arbitrarily assuming that a fetus is a person. His "proof" takes the same form as that offered by Blackmun. He presents a long list of court cases that he claims are consistent with his views on privacy. Again, whatever reasoning is in these legal precedents apparently has less significance than the fact that there are numerous such precedents.

One leaves this exercise with a sense that weak sense critical thinking is the common currency of legal reasoning. The adversary model encourages the belief that one has little responsibility to wonder and reflect. One's task is to stick with a conclusion and persuade others to embrace it. If one can successfully argue, as both Blackmun and Rehnquist attempted,

that most relevant authorities agree with you, then legal training encourages you to do so. That these authorities may have weak or strong reasons is less important than the prospect that citing them might create a bandwagon on behalf of the desired legal conclusion.

called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.[48] Proponents of this view point out that in many States, including Texas,[49] by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.[50] They claim that adoption of the "quickening" distinction through
152 received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests, and the weight to be attached to them, that this case is concerned.

VIII

[9] The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8–9, 88 S.Ct. 1868, 1872–1873, 20 L.Ed.2d 889 (1968), Katz v. United States, 389 U.S. 347, 350, 88 S.Ct. 507, 510, 19 L.Ed.2d 576 (1967); Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), see Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484–485, 85 S.Ct., at 1681–1682; in the Ninth Amendment, *id.*, at 486, 85 S.Ct. at 1682 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541–542, 62 S. Ct. 1110, 1113–1114, 86 L.Ed. 1655 (1942); contraception, Eisenstadt v. Baird, 405 U.S., at 453–454, 92 S.Ct., at 1038–1039; *id.*, at 460, 463–465, 92 S. 153
Ct. at 1042, 1043–1044 (White, J., concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510,

48. See, *e. g.*, State v. Murphy, 27 N.J.L. 112, 114 (1858).

49. Watson v. State, 9 Tex.App. 237, 244–245 (1880); Moore v. State, 37 Tex. Cr.R. 552, 561, 40 S.W. 287, 290 (1897); Shaw v. State, 73 Tex.Cr.R. 337, 339, 165 S.W. 930, 931 (1914); Fondren v. State, 74 Tex.Cr.R. 552, 557, 169 S.W. 411, 414 (1914); Gray v. State, 77 Tex.Cr.R. 221, 229, 178 S.W. 337, 341 (1915). There is no immunity in Texas for the father who is not married to the mother. Hammett v. State, 34 Tex.Cr.R. 635, 209 S.W. 661 (1919); Thompson v. State, Tex. Cr.App., 493 S.W.2d 912 (1971), appeal pending.

50. See Smith v. State, 33 Me., at 55; In re Vince, 2 N.J. 443, 450, 67 A.2d 141, 144 (1949). A short discussion of the modern law on this issue is contained in the Comment to the ALI's Model Penal Code § 207.11, at 158 and nn. 35–37 (Tent.Draft No. 9, 1959).

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